

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

AMBER PERKINS,

Plaintiff.

Y.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CIVIL NO. 04-5508 RBL

REPORT AND RECOMMENDATION

Noted July 1, 2005

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B), and Local Magistrates Rule MJR 4(a)(4), and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed. After reviewing the record, the undersigned recommends that the decision of the Commissioner be AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

Amber Perkins filed her application for supplemental social security benefits on February 4, 2002. [Tr. 60-63]. Perkins alleged disability beginning in 1998 due to severe psychological impairments, including depression, PTSD, personality disorder, and substance abuse disorder. [Tr 81]. Plaintiff filed her application for benefits on February 4, 2002. [Tr. 60-63]. Her application was denied initially [Tr 32-35], and on reconsideration. [Tr. 37-39].

1 An administrative hearing was held on July 30, 2003 before ALJ Jack Bauer, and witnesses
 2 were called. On October 29, 2003, the ALJ found that Plaintiff was disabled when considering
 3 limitations attributable to her substance abuse, but not disabled within the meaning of the Social
 4 Security Act because the substance abuse disorder was material to the finding of disability. [Tr. 19-
 5 28]. The ALJ found that Plaintiff retained the residual functional capacity (RFC) to perform a full
 6 range of work reduced by nonexertional limitations. The Appeals Council denied administrative
 7 review [Tr 5-7], making the ALJ's decision the final decision of the Commissioner for the purpose of
 8 judicial review. 20 C.F.R. §422.210; Sims v. Apfel, 120 S.Ct. 2080, 2083 (2000).

9 DISCUSSION

10 The Court may set aside the Commissioner's denial of Social Security disability benefits when
 11 the ALJ's findings are based on legal error or are not supported by substantial evidence in the record
 12 as a whole. 42 U.S.C. §405(g); Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993). Substantial
 13 evidence means more than a scintilla, but less than a preponderance; it is such relevant evidence as a
 14 reasonable mind might accept as adequate to support a conclusion. Magallanes v. Bowen, 881 F.2d
 15 747, 750 (9th Cir. 1989). We consider the evidence as a whole, weighing both evidence that
 16 supports, and evidence that detracts from the Commissioner's conclusion. Smolen v. Chater, 80
 17 F.3d 1273 (9th Cir. 1996). Credibility determinations are the province of the ALJ. Fair v. Bowen,
 18 885 F.2d 597, 603 (9th Cir. 1989).

19 Sequential Evaluation Process

20 The claimant bears the burden of proving that she is disabled within the meaning of the
 21 Social Security Act. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as
 22 the "inability to engage in any substantial gainful activity by reason of any medically determinable
 23 physical or mental impairment which can be expected to result in death or which has lasted, or can be
 24 expected to last for a continuous period of not less than twelve months[.]" 42 U.S.C. §
 25 423(d)(2)(A), 1382c(a)(3)(A); 20 C.F.R. §416.905.

1 In evaluating Plaintiff's claim, the ALJ followed the five-step sequential evaluation process
 2 for determining whether a claimant is disabled within the meaning of the Social Security regulations.
 3 Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999); Bowen v. Yuckert, 482 U.S. 137, 140 (1987);
 4 20 C.F.R. § 416.920 (2000). The Plaintiff has the burden of proof at steps one through four; at step
 5 five the burden shifts to the Commissioner to show that Plaintiff can perform work that exists in
 6 significant numbers in the national economy.

7 Findings of Administrative Law Judge Bauer

8 The ALJ found at step one that Plaintiff had never engaged in substantial gainful activity.
 9 [Tr. 20, 24, 27, Finding 2 (F2)]. At step two, the ALJ found that Plaintiff has severe depression,
 10 anxiety disorder, and substance addiction disorder. [Tr 24, 27/F3]. At step three, the ALJ found that
 11 Plaintiff's substance abuse addiction disorder met the requirements for Listing 12.09, and Plaintiff
 12 was disabled. [Tr. 24, 25, 27/F3]. Because the ALJ determined that Plaintiff was not disabled absent
 13 the drug and alcohol addiction, the ALJ found that Plaintiff's substance abuse was material to the
 14 finding of disability, and she was ineligible for supplemental security income benefits. [Tr. 19, 27/F 3,
 15 28].

16 The ALJ found that without substance abuse, the Plaintiff had the RFC to perform a full
 17 range of exertional work, but due to her mental limitations, was restricted to no more than simple
 18 and routine tasks, and occasional contact with the public, co-workers, and supervisors [Tr. 26,
 19 28/F5]. At step four, the ALJ found that Plaintiff had no past relevant work history [Tr. 26, 28/F6].
 20 At step five, the ALJ determined that Plaintiff could perform work as a cleaner/housekeeper and
 21 packager, jobs that existed in significant numbers in the national economy [Tr. 27, 28, F28]. The
 22 ALJ therefore found Plaintiff not disabled. [Tr. 27-28, F 12-14].

23 The Plaintiff argues that the Commissioner's decision denying benefits fails to give proper
 24 consideration to the opinions of examining and treating psychiatrists and psychologists, and to the
 25 testimony of Phillip Williams, M.A., Martha Rekdahl, and Ms. Perkins. The Defendant argues that

1 the Commissioner's decision was supported by substantial evidence and is free of legal error.

2 The ALJ Properly Assessed Plaintiff's Credibility

3 To reject a Plaintiff's subjective complaints, the ALJ must provide clear and convincing
 4 reasons which are supported by substantial evidence. Morgan v. Commissioner of the SSA, 169
 5 F.3d 595, 599 (9th Cir. 1999).

6 The ALJ considered Plaintiff's testimony, and found it was not entirely credible concerning
 7 her impairments and their impact on her ability to work. [Tr. 25-26]. Inconsistencies between a
 8 claimant's allegations of disability and activities of daily living bears on the claimant's credibility.
 9 Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). The ALJ concluded that Plaintiff's conduct in
 10 acting as a "hook up" for buyers seeking sellers of marijuana [Tr 345-350], occasional shopping [Tr.
 11 26, 67], going to the river with friends, and having a boyfriend [Tr. 26, 227] , was inconsistent with
 12 her testimony regarding her inability to leave her home and be around people. [Tr. 341-342].

13 A claimant's failure to seek treatment or to follow a prescribed course of treatment is a valid
 14 basis for discounting a claimant's credibility regarding their ailments. Fair v. Bowen, 885 F.2d 597,
 15 603 (9th Cir. 1989).

16 The ALJ considered Plaintiff's refusal to engage in substance abuse treatment. [Tr. 26, 173,
 17 214, 218-19, 222, 239, 341-43], and noncompliant use of prescribed medications as inconsistent with
 18 her allegations of disability. For instance, Plaintiff altered her medications on her own, and purchased
 19 non-prescribed Vicodin from friends. [Tr. 22, 26, 165, 218, 231-32]. The ALJ also noted that
 20 Plaintiff cancelled or failed to show up for numerous counseling sessions and medication review
 21 appointments. [Tr. 22-23, 145, 148, 151, 159-60, 166, 169, 202, 204, 212-14, 216, 220,230].

22 Where, as here, the ALJ gave clear and convincing reasons supported by substantial
 23 evidence in the record for rejecting Plaintiff's subjective complaints, the court may not second guess
 24 that decision. Id. at 604.

25 The ALJ Properly Considered Martha Rekdahl's Testimony

1 The ALJ did not give significant weight to the testimony of Plaintiff's grandmother, Martha
 2 Rekdahl because Ms. Rekdahl did not appear to be aware of the nature and extent of Plaintiff's drug
 3 and alcohol use [Tr. 26, 354-56]. While lay testimony is competent evidence that the ALJ must
 4 consider when discounting testimony, the ALJ must give germane reasons for rejecting the opinions
 5 of the lay witnesses. Nguyen v. Chater 100 F.3d 1462, 1467 (9th Cir. 1996), citing Dodrill v.
 6 Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993).

7 The ALJ found Ms. Rekdahl's testimony that Plaintiff doesn't smoke marijuana at her place
 8 to be inconsistent with Plaintiff's statements that she continues to use marijuana, but doesn't leave
 9 the house. Also, Plaintiff facilitated marijuana sales in Rekdahl's house. [Tr. 345-50]. The ALJ thus
 10 provided germane reasons for rejecting Ms. Rekdahl's testimony.

11 The ALJ Properly Considered the Medical Evidence

12 Phillip Williams' Testimony

13 Phillip Williams provided mental health counseling to Plaintiff since September 11, 2001
 14 [Tr. 238]. Williams held the opinion that Plaintiff's ongoing substance dependency was not material
 15 to her disability. [Tr 240]. The ALJ properly rejected this opinion. Giving a diagnosis is beyond the
 16 competence of lay witnesses. Nguyen, 100 F.3d at 1467, discussing Vincent v. Heckler, 739 F.2d
 17 1393, 1395 (9th Cir. 1984). Because Mr. Williams was not a physician, he was incompetent to
 18 provide a diagnosis or attribute behavior to a particular cause [Tr. 25, 238-40]. See C.F.R. §
 19 416.913(a); Id. at 1467. The ALJ did, however, credit his observations that Plaintiff needed, but
 20 refused substance abuse treatment, and that her symptoms diminished with proper use of medication
 21 and reduction or abstinence from drugs and alcohol. [Tr. 22-23, 203, 207-09, 214, 218-19, 221, 223,
 22 227-28, 239]. The ALJ incorporated Williams'opinion as to Plaintiff's limitations on interaction
 23 with the public, coworkers and supervisors, and ability to perform simple, routine tasks into his
 24 residual functional capacity finding. [Tr. 26, 28/F5,7]. The ALJ need not incorporate opinions based
 25 on Plaintiff's discredited complaints, such as her inability to leave home, and tendency toward self-
 26

1 isolation. The ALJ gave clear and convincing reasons for discounting Williams' opinion, which were
 2 supported by substantial evidence.

3 Plaintiff's Substance Abuse was Material to Disability Determination

4 The ALJ's determination that Plaintiff met the requirements of the Listings for substance
 5 abuse disorder was based largely on Plaintiff's testimony, the observations of Mr. Williams, and
 6 Plaintiff's grandmother's testimony that Plaintiff's difficulty with mood and isolation occur when she
 7 abused alcohol and drugs.

8 According to Social Security Regulations, “[t]he key factor [in] determining whether drug
 9 addiction or alcoholism is a contributing factor material to the determination of disability is whether
 10 [an individual] would still [be found] disabled if [she] stopped using drugs or alcohol.” Ball v.
 11 Massanari, 254 F.3d 817, 821 (9th Cir. 2001); 20 C.F.R § 404.1535 (1999). If the remaining
 12 impairments and limitations are not disabling, drug or alcohol abuse is material to the finding of
 13 disability, and benefits must be denied. Id. The burden of proof lies with the claimant to prove that
 14 her drug and alcohol abuse is not material to the disability determination. Ball v. Massanari, 254
 15 F.3d at 821.

16 The ALJ may not reject a treating physician's opinion without providing specific, legitimate
 17 reasons supported by substantial evidence. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

18 The evidence of record contains the psychological evaluations conducted by Trevelyan
 19 Houck, Terilee Wingate, and reviewing state psychological consultant Kristine Harrison.

20 Plaintiff's reliance on the evaluations of psychologist Trevelyan Houck, Ph.D., [Tr. 121-126,
 21 245-50] and Terilee Wingate, Ph.D. [Tr. 191-97] to dispute the ALJ's finding of materiality is
 22 unpersuasive. While Plaintiff asserts that none of the psychologists assessed substance addiction
 23 disorder as material to their finding of disability, both Houck and Wingate concluded there was no
 24 indication of alcohol or drug abuse [Tr. 122, 192]. Apparently, Plaintiff was not forthcoming about
 25 her drug and alcohol use. Thus, they were unaware of the extent of Plaintiff's substance abuse. It

1 follows that they did not distinguish between the level of impairment that would exist absent
2 substance abuse. The ALJ appropriately rejected their opinion that drug and alcohol use was not an
3 issue.

4 The RFC assessment of Dr. Harrison, written with and without substance abuse, indicated
5 that Plaintiff's functioning was the same. [Tr. 129]. The assessment identified only one area of
6 marked limitation: the ability to interact appropriately with the general public. [Tr. 128].

7 Hypothetical Posed to VE Mary Lou Minton

8 The hypothetical to the Vocational Expert by the ALJ restricted Plaintiff to no more than
9 occasional contact with supervisors, co-workers, and the public [Tr. 358, 360]. This was consistent
10 with the mental RFC assessment of Dr. Kristine Harrison. The ALJ is not obligated to accept all of a
11 claimant's proposed limitations, as long as the ALJ's findings are supported by substantial evidence.
12 See Osenbrock v. Apfel, 240 F.3d 1157, 1163-65 (9th Cir. 2001). The ALJ's residual functional
13 capacity finding and hypothetical posed to the ALJ included the Plaintiff's functional limitations, and
14 constituted substantial evidence. Id. at 1164-65.

15 CONCLUSION

16 The Commissioner 's decision is supported by substantial evidence in the record as a whole.
17 Accordingly, the decision of the Commissioner is AFFIRMED. Pursuant to 28 U.S.C. § 636(b)(1)
18 and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from
19 service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections
20 will result in a waiver of those objections for purposes of appeal. Tomas v. Arn, 474 U.S. 140
21 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter
22 for consideration on **July 1, 2005** as noted in the caption.

23 DATED this 7th day of June, 2005.

24 /s/ J. Kelley Arnold
25 J. Kelley Arnold
U.S. Magistrate Judge

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